

Law vol 25.

HISTORICAL ACCOUNT

OF THE

Laws respecting Roman Catholics,

AND OF THE

Laws passed for their Relief;

WITH OBSERVATIONS

ON THE

LAWS REMAINING IN FORCE AGAINST THEM:

*Being the last Note in that part of the New
Edition upon COKE LITTLETON, which
is executed by*

MR. BUTLER.



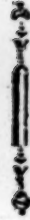
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TO THE RIGHT HONORABLE

ROBERT EDWARD, LORD PETRE,

BARON PETRE OF WRITTLE,

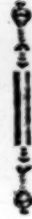
IN THE COUNTY OF ESSEX,

THIS PUBLICATION

IS,

WITH HIS LORDSHIP'S PERMISSION,

RESPECTFULLY DEDICATED.





termed, *papal provision*, or the pope's presenting to English benefices,—and *papal process*, or the pope's interfering in the process of the ecclesiastical courts of England. This will lead, II. to a statement of the laws, which, since the division of the churches at the Reformation, have been past against those, who, from their remaining in communion with the see of Rome, have received, in the laws of England, the appellation of papists, and persons professing the popish religion. III. After this, will be shewn the effect and operation of the laws, which have been past, in the present reign, to relieve persons of that description. IV. Some general observations will then be offered, to point out the particular laws, to which his majesty's English subjects in communion with the see of Rome are still exposed, but which do not, in any respect, affect English protestant dissenters; and some remarks on the operation of the toleration act, and the act for quieting corporations, so far as they affect Roman catholics—on the right or obligation of Roman catholics to serve in the militia, and to serve on juries, and on their right to be admitted to factories, and to hold offices exercisable abroad.

I. WITH

I. WITH RESPECT TO PAPAL PROVISIONS AND PAPAL PROCESS:—

The 31. Edw. 1. is said to be the foundation of all the subsequent statutes of præmunire. It recites, that, the abbots, priors, and governors, had, at their own pleasure, set diverse impositions upon the monasteries and houses in their subjection; to remedy which, it was enacted, that, in future, religious persons should send nothing to their superiors, beyond the sea; and that, no impositions whatsoever should be taxed by priors aliens. By the 25. Edw. 3. stat. 6. 27. Edw. 3. stat. 1. c. 4. and stat. 2. c. 1, 2, 3, 4. it was enacted, that, the court of Rome should present or collate to no bishoprick or living in England: and that, if any one disturbed any patron, in the presentation to a living, by virtue of papal provision, such provisor should pay fine and ransom to the king, at his will, and be imprisoned, till he renounced such provision. The same punishment was inflicted on such, as should cite the king or any of his subjects, to answer in the court of Rome. By the 3. Richard 2. ch. 3. and 7. Richard 2. ch. 12. it was enacted, that, no alien should be capable of letting his benefice to farm; and

that, no alien should be capable of being presented to any ecclesiastical preferment, under the penalty of the statute of provisors. By the stat. 12. Richard 2. c. 15. all liegemen of the king, accepting of a living, by any foreign provision, were put out of the king's protection, and the benefice made void. To which, the 13. Richard 2. stat. 2. c. 2. adds banishment and forfeiture of lands and goods; and by c. 3. of the same statute, it was enacted, that, any person bringing over any citation or excommunication, from beyond sea, on account of the execution of the foregoing statutes of provisors, should be imprisoned, forfeit his goods and lands, and moreover suffer pain of life and member. In the writ for the execution of these statutes, the words *præmunire facias*, being used, to command a citation from the party, have denominated, in common speech, not only the writ, but the offence itself of maintaining the papal power, by the name of *præmunire*. The 16. Richard 2. c. 5. which is the statute generally referred to by all subsequent statutes, is usually called the statute of *præmunire*. It enacts, that, whoever procures at Rome, or elsewhere, any translations, processes, excommunications, bulls, instruments, or

or other things, which touch the king, against him, his crown, and realm, and all persons aiding and assisting therein, shall be put out of the king's protection; their lands and goods forfeited to the king's use; and they shall be attached by their bodies, to answer to the king and his council, or process of *præmunire facias* shall be made out against them, as in other cases of provisors. By the 2. Henry 4. c. 3. all persons, who accept any provision from the pope, to be exempt from canonical obedience to their proper ordinary, were also subjected to the penalties of *præmunire*. This is said to be the last ancient statute concerning this offence, till the separation of the church of England from the church of Rome, in the reign of Henry 8. The penalties of *præmunire* have been since applied to other offences, some of which bear more, some less, and some no relation to this original offence. Its punishment is to be gathered from the foregoing statutes, and is thus shortly summed up by sir Edward Coke, " That, from the conviction, the defendant shall be out of the king's protection, and his lands and tenements, goods and chattels, forfeited to the king; and " that,

“ that, his body shall remain at the king’s
“ pleasure, or, as other authorities have it,
“ during his life.” Such is the offence of
præmunire, and such its punishment by the
law of England. Whenever it is said, that,
a person, by any act, incurs the penalties of a
præmunire, it is meant to express, that, he
thereby incurs the penalties, which, by the
different statutes we have mentioned, are in-
flicted for the offences therein described.
This account of the offence of præmunire,
and its punishment, is taken, or rather co-
pied, from Sir William Blackstone’s 4th Com-
mentary, chap. 8.

II. WITH RESPECT TO THE LAWS,
WHICH, SINCE THE SEPARATION OF THE
CHURCH OF ENGLAND FROM THE CHURCH
OF ROME, AT THE TIME OF THE REFOR-
MATION, HAVE BEEN PAST AGAINST THOSE,
WHO REMAINED IN COMMUNION WITH
THE SEE OF ROME,—the laws against them
may be reduced under five heads:—

II. 1st. The first, are *those, which subject*
them to penalties and punishments for exercising
their religious worship;—under which head,
may be ranked, the laws respecting their pla-

ces of education, and the ministers of their church. By these laws, if any English priest of the church of Rome, born in the dominions of the crown of England, came to England from beyond the seas, or tarried in England three days, without conforming to the church, he was guilty of high treason; and those incurred the guilt of high treason, who were reconciled to the see of Rome, or procured others to be reconciled to it. By these laws also, papists were totally disabled from giving their children any education in their own religion: if they educated their children at home, for maintaining the school-master, if he did not repair to church, or was not allowed by the bishop of the diocese, they were liable to forfeit £.10. a month, and the school-master was liable to forfeit forty shillings a day; if they sent their children for education to any school of their persuasion abroad, they were liable to forfeit £.100. and the children so sent were disabled from inheriting, purchasing or enjoying any lands, profits, goods, debts, duties, legacies, or sums of money.—Saying mass was punishable by a forfeiture of 200 marks: hearing it, by a forfeiture of 100. See 1. Eliz. ch. 2. 23. Eliz. ch. 1. 27. Eliz. ch. 2. 29. Eliz. ch. 6. 35. Eliz.

Eliz. ch. 2. 2. Jac. 1. ch. 4. 3. Jac. 1. ch. 4. 5. 7. Jac. 1. ch. 6. 3. Car. 1. ch. 2. 25. Car. 2. ch. 2. 7 & 8. W. 3. ch. 27. 1 Geo. 1. ch. 13.—II. 2d. Under the second head were those laws, which punished the English communicants with the church of Rome *for not conforming to the established church*. These are generally called the statutes of recusancy. It should be observed, that, absence from church, alone, and unaccompanied by any other act, constitutes recusancy, in the true sense of that word. Till the statute of the 35. Eliz. chap. 2. all non-conformists were considered as recusants, and were all equally subject to the penalties of recusancy: that statute was the first penal statute made against popish recusants, by that name, and as distinguished from other recusants. From that statute arose the distinction between protestant and popish recusants; the former were subject to such statutes of recusancy, as preceded that of the 35th of queen Elizabeth, and to some statutes against recusancy, made subsequently to that time; but they were relieved from them all, by the act of toleration, in the first year of king William's reign. From the 35th Eliz. c. 2. arose also the distinction, between papists and persons

sons professing the popish religion, and popish recusants, and popish recusants convict. Notwithstanding the frequent mention in the statutes, of papists and persons professing the popish religion, neither the statutes themselves, nor the cases adjudged upon them, present a clear notion of the acts or circumstances that, in the eye of the law, constituted a *papist*, or a *person professing the popish religion*. When a person of that description absented himself from church, he filled the legal description of a *popish recusant*: When he was convicted in a court of law of absenting himself from church, he was termed in the law a *popish recusant convict*: to this must be added the *constructive recusancy* hereinafter mentioned to be incurred by a refusal to take the oath of supremacy.—With respect to the statutes against recusancy; by these statutes, popish recusants convict were punishable by the censures of the church, and by a fine of £. 20. for every month, during which, they absented themselves from church; they were disabled from holding offices or employments; from keeping arms in their houses; from maintaining actions or suits at law or in equity; from being executors or guardians; from presenting to advowsons; from practising in

the

the law or physic; and from holding offices, civil or military; they were subject to the penalties attending excommunication, were not permitted to travel five miles from home, unless by licence, upon pain of forfeiting all their goods; and might not come to court under pain of £. 100. A married woman, when convicted of recusancy, was liable to forfeit two thirds of her dower or jointure. She could not be executrix or administratrix to her husband, nor have any part of his goods; and, during her marriage, she might be kept in prison, unless her husband redeemed her at the rate of £. 10. a month, or the third part of his lands; popish recusants convicted were, within three months after conviction, either to submit and renounce their religious opinions, or, if required by four justices, to abjure the realm; and if they did not depart, or if they returned without licence, they were guilty of felony, and were to suffer death as felons.—(See the statutes referred to under the former head.)—II. 3. *As to the penalties or disabilities attending the refusal of Roman catholics to take the oath of supremacy, the declaration against transubstantiation, and the declaration against popery: It must be premised, that, the Roman catholics make*

make no objection to take the *oath of allegiance*, 1. G. 2. c. 13. or the *oath of abjuration*, 6. Geo. 3. c. 53.—*With respect to the oath of supremacy*,—by the 1st Elizabeth, ch. 1. the persons therein mentioned were made compellable to take the oath of supremacy contained in that act: by the 3d of king James the 1st, ch. 4. another oath was prescribed to be taken, commonly called the oath of allegiance and obedience: these oaths were abrogated by the 1st of king William and queen Mary, sess. 1. ch. 8. and a new oath of allegiance and a new oath of supremacy were introduced, and required to be taken in their stead: the statute made in the 2d session of the 1st year of king George the 1st, ch. 13. contains an oath of supremacy, in the same words, as the oath of supremacy, required to be taken by the 1st of king William and queen Mary. By that oath, persons are made to swear, that “no foreign prince, “person, prelate, state or potentate, hath, or “ought to have, any jurisdiction, power, supremacy, pre-eminence or authority, ecclesiastical or spiritual, within the realm.” It was required to be taken by the persons therein named; it might be tendered to any person, by any two justices of the peace; and persons refusing the oath so tendered

were adjudged to be popish recusants convicted, and to forfeit and be proceeded against, as such. This was the *constructive recusancy* referred to above. It was not the offence itself of recusancy, which, as we have already observed, consisted merely in the party's absenting himself from church: it was the offence of not taking the oath of supremacy, and the other oaths prescribed by the act of 1. Geo. 1. the refusal of which, was, by that statute, placed on the same footing, as a legal conviction on the statutes of recusancy, and subjected the party refusing to the penalties of those statutes. This was the most severe of all the laws against papists. The punishment of recusancy was penal in the extreme; and the persons objecting to the oath in question, might be subjected to all the penalties of recusancy, merely by their refusing the oath, when tendered to them. It added to the penal nature of these laws, that, the oath in question, might be tendered, at the mere will of two justices of peace, without any previous information or complaint before a magistrate, or any other person. Thus, by refusing to take the oath of supremacy, when tendered to them, they became liable to all the penalties of recusancy: and the same refusal,

fusal, by 7. & 8. Wm. 3. ch. 4. and 1. Geo. 1. st. 2. ch. 13. restrained them from practising the law as advocates, barristers, solicitors, attornies, notaries, or proctors, and from voting at elections.—II. 4. *With respect to receiving the sacrament of our Lord's supper*: By the 13. Charles 2. (commonly called the corporation act), no persons can be legally elected to any office, relating to the government of any city or corporation, unless within a twelve month before, he has received the sacrament of the Lord's supper, according to the rites of the church of England; and he is also enjoined to take the oaths of allegiance and supremacy, at the same time, that, he takes the oath of office, or, in default of either of these requisites, such election shall be void.—II. 5. *As to the declaration against transubstantiation*: By the 25th Car. 2. ch. 2. (commonly called the test act), all officers, civil and military, are directed to take the oath, and make the declaration against transubstantiation, in the court of King's Bench or Chancery, the next term, or at the next quarter sessions, or (by subsequent statutes), within six months, after their admission, and also, within the same time, to receive the sacrament of the Lord's supper, accord-

according to the usage of the church of England, in some public church, immediately after divine service and sermon; and to deliver into court, a certificate thereof, signed by the minister and church-warden; and also to prove the same, by two credible witnesses, upon forfeiture of £. 500. and disability to hold the office.—II. 6. *With respect to the declaration against popery*: The act past in the 30th year of Car. 2. st. 2. ch. 1. contains the declaration, and prescribes it to be made, by members of either house of parliament, before they take their seats. By it, they declare their disbelief of the doctrine of transubstantiation, and their belief that, the invocation of saints, and the sacrifice of the mass, are idolatrous.—II. 7. *With respect to the laws affecting their landed property*:—How this was affected by the laws against recusancy, has been already mentioned. By the 11. & 12. W. 3. ch. 4. it was enacted, that, a person educated in the popish religion, or professing the same, who did not in six months, after the age of sixteen, take the oaths of allegiance and supremacy, and subscribe the declaration of the 30th Cha. 2. should, in respect of himself only, and not of his heirs or posterity, be disabled to inherit, or take lands by

by descent, devise, or limitation, in possession, reversion, or remainder: and that, during his life, till he took the oaths, and subscribed the declaration against popery, his next of kin, who was a protestant, should enjoy the lands, without accounting for the profits; and should be incapable of purchasing; and that, all estates, terms, interests, or profits out of lands, made, done, or suffered to his use, or in trust for him, should be void. By 3. Jac. 1. ch. 5. 1. W. & M. c. 26. 12. Ann, st. 2. c. 14. and 11. Geo. 2. c. 17. papists, or persons professing the popish religion, were disabled from presenting to advowsons, and other ecclesiastical benefices, and to hospitals and other charitable establishments. By annual acts of the legislature, papists being of the age of 18 years, and not having taken the oaths of allegiance and supremacy, were subjected to the burthen of the double land-tax. By a statute made in the second session of the 1st year of Geo. 1. ch. 55. they were required to register their names and estates in the manner, and under the penalties, therein mentioned; and by the 3d Geo. 1. c. 18. continued by several subsequent statutes, an obligation of enrolling their deeds and wills was imposed on them. Such were the principal

cial penal laws against Roman catholics, *immemsus aliarum super alias acervatarum legum cumulus* (Liv. 3. 34.), at the time of the accession of the house of Brunswick.

III. WITH RESPECT TO THE LAWS WHICH HAVE BEEN PAST IN THE PRESENT REIGN FOR THE RELIEF OF ROMAN CATHOLICS:—

III. 1. The only act of any importance, which, till the reign of his present majesty, was past for their relief, (and that operated but in an indirect manner for *their* benefit), was *the act of the 3d Geo. 1. c. 18.* On the construction of the 11. & 12. Wm. 3. ch. 4. it had been held, that, as it expressly confined the disability of papists to take by descent to themselves only, and preserved their heirs and posterity from its operation, it was not to be construed as preventing the vesting of the freehold and inheritance in them, in cases of descent, or transmitting them to their posterity: but that, the disability respected only the pernancy of the profits, or beneficial property of the lands, of which it deprived them, during their nonconformity. Whether that part of the statute, which relates to their taking

taking by purchase, should receive the same construction, was a frequent subject of discussion, the statute being, in that branch of it, without any limitation. To remedy this, the act, we are speaking of, was past. It enacts, that, no sale for a full and valuable consideration, by the owner or reputed owner of any lands, or of any interest therein, theretofore made, or thereafter to be made, to a protendant purchaser, shall be impeached, by reason of any disability of such papist, or of any person under whom he claims, in consequence of the 11. & 12. W. 3. unless the person taking advantage of this disability, shall have recovered before the sale, or given notice of his claim to the purchaser, or before the contract for sale, shall have entered his claim at the quarter sessions, and *bona fide* pursued his remedy. The act then recites the clauses of the 12. & 13. W. 3. disabling papists from purchasing; and afterwards enacts, that, these clauses shall not be thereby altered or repealed, but shall remain in full force. This proviso is couched in such general words, that, it created a doubt in some, whether it did not nearly frustrate the whole effect of the act. To this it was answered, that, notwithstanding the proviso, the enacting part of the

statute was in full force for the benefit of a protestant purchaser; and that, the proviso operated only to declare, that, papists themselves, should not derive any benefit from the act, in any purchases they should attempt to make, under the foregoing clauses. This was considered the better opinion, and on the authority of it, many purchases of considerable consequence were made. See also 6. Geo. 2. ch. 5. Thus the laws against the roman catholics stood, at the time of the accession of his present majesty. During his reign two acts, each of great importance, have been past in their favour.—III. 2. *By that of the 18th of his reign*, ch. 60. it was enacted, that, so much of the 11. & 12. W. 3. as related to the prosecution of popish priests and jesuits, and imprisoning for life papists, who keep schools, or to disable papists from taking by descent or purchase, should be repealed, as to all papists or persons professing the popish religion, claiming under titles not theretofore litigated, who, within six months after the act past, or their coming of age, should take the oath thereby prescribed. Upon this act, a case was decided in Chancery, on the 18th of December 1783, under the name of Bunting v. Williamson.

v. Williamfon. In that cafe, a bill had been filed, claiming an eftate given to a perfon profefling the popifh religion, by will, alledging the incapacity occafioned by the act of the 11th and 12th of king William. The teftator died many years before, and after his death, a fuit had been instituted by another perfon, who claimed as his heir at law, and that fuit was depending at the time, when the ftatute of the 18th Geo. 3. c. 60. was paffed; but was afterwards difmiffed for want of profecution. The plaintiff filed his bill, fome time after the act, claiming in right of his wife, as heir at law. The defendants pleaded their title under the teftator's will; and that, the defendant, who was beneficially interefted, having or claiming the eftate under that will, had taken the oath prefcribed by the act, and concluded with an averment, that, the title had not been before litigated by the plaintiff, or any perfon under whom he claimed. The plaintiffs, on argument of the plea, contended, that, the words, *not hitherto litigated*, extended to the cafe then before the court, becaufe the title had been litigated, and was in litigation at the time the act paffed. But the lords commiffioners, Affhurft and Hotham, were clearly of opinion,

opinion, that, the plaintiff not having before litigated the title, nor claiming under any person who had litigated it, the case of the defendants was within the benefit of the act, notwithstanding the prior litigation; and the plea was allowed.—III. 3. *With respect to the act of the 31st of his present majesty, cap. 32.* That statute may be divided into six parts: The 1st, contains the declaration and oath afterwards referred to in the body of the act, and prescribes the method of taking it: The 2d, is a repeal of the statutes of recusancy, in favour of persons taking the oath thereby prescribed: The 3d, is a toleration, under certain regulations, of the religious worship of the roman catholics, qualifying in like manner, and of their schools for education: The 4th, enacts, that, in future no one shall be summoned to take the oath of supremacy prescribed by the 1st Wm. and Mary, sect. 1. c. 8. and 1st Geo. 1. sect. 2. cap. 13. or the declaration against transubstantiation required by the 25th Ch. 2.;—that, the 1st Wm. and Mary, sect. 1. ch. 9. for removing papists or reputed papists from the cities of London and Westminster shall not extend to roman catholics, taking the appointed oath;—and that, no peer of Great Britain or Ireland,

land, taking that oath, shall be liable to be prosecuted for coming into his majesty's presence, or into the court or house where his majesty resides, under the 30th Car. 2. stat. 2. ch. 1.: The 5th part of the act, repeals the laws requiring the deeds and wills of roman catholics to be registered or inrolled: The 6th dispenses persons acting as a counsellor at law, barrister, attorney, clerk, or notary from taking the oath of supremacy or the declaration against transubstantiation.—The first part of the act gives rise to two observations. The declaration prescribed by the act, is contained in these words: "I, *A. B.* do hereby declare, that I do profess the "roman catholic religion." Till the passing of this act, the persons, who were the subject of it, were known in the English law, by the name of papists, reputed papists, or persons professing the popish religion. By requiring this declaration from them, the law has imposed on them, and probably will in future recognize them by, the name of roman catholics. Still, when the antient penal laws against them are to be mentioned with professional accuracy, it may sometimes be found necessary, (and this necessity has been experienced in the course of this annotation), to mention

mention them, under the name applied to them by the abrogated law. The other observation is of more importance. As the bill was originally framed, and as it stood, when, having past the commons, it was brought into the house of lords, the first clause in it directed, that, the oath contained in the act of the 18th year of the reign of his present majesty, should be taken no longer; but that, the oath appointed by the bill, should, in future, be administered in its stead, and should give the same benefits and advantages, and should operate to the same effects and purposes, as the oath contained in the 18th of his present majesty. This clause was altered, in the house of lords, to the form, in which it now stands. It does not express, that, the oath contained in it shall entitle the persons taking it, to the benefits of the act of the 18th of his present majesty: it only expresses, that, it shall be lawful for catholics to take the oath of the 31st of his present majesty, at the places and times, and in manner therein mentioned. Thus, it is very uncertain, whether persons taking only the oath prescribed by the 31st of his present majesty, will be entitled to the benefit of the act of the 18th of his present majesty, so as to be relieved

lieved from the penalties and disabilities, from which, the persons taking the oath prescribed by that act, were released by it. The chief of these penalties and disabilities were those inflicted by the 11th and 12th Wm. 3., which disabled them from taking by descent or purchase. From these penalties and disabilities they are exposed to much real grievance. It seems, therefore, advisable for every roman catholic, who wishes to be secure in the enjoyment of his landed property, to take both the declaration and oath prescribed by the act of the 31st, and the oath prescribed by the 18th of his present majesty.—III. 4. *As to the double land tax*, that, being imposed by the annual land tax act, a repeal of it could not be effected by any prospective act. It is repealed by omitting from the annual land tax act, the clause imposing it. The land tax act of the year 1794 contains also a clause, which, after reciting, that, lands formerly liable to a double assessment, were then possessed by protestants, enacted, that, where any place, in consequence of that circumstance, should be rated, at more than four shillings in the pound, the commissioners might, on complaint, examine into the truth of the complaint, and certify the same to the barons of the

the exchequer, before the 29th of the following September, who were to discharge the excess by the following November.

IV. WITH RESPECT TO THE COMPARATIVE SITUATION OF THE PROTESTANT DISSENTERS AND THE ROMAN CATHOLICS, AS TO THE PENALTIES AND DISABILITIES TO WHICH THEY ARE SUBJECTED BY LAW, IN CONSEQUENCE OF THEIR RELIGIOUS PRINCIPLES;—

It has been already shewn, how the law stands on the corporation and test acts.—

IV. 1. The statute of the 1st William and Mary, (commonly called the *toleration act*); exempts all dissenters, except papists and such as deny the Trinity, from all penal laws relating to religion, provided they take the oaths of allegiance and supremacy, and subscribe the declaration against popery, and repair to some congregation registered in the bishop's court, or at the sessions. But there is nothing in this act, which dispenses, either with the test act or the corporation act, so far as they impose the obligation of receiving the sacrament of our Lord's supper on persons serving in offices, or elected to serve in corporations.

corporations. With respect therefore to the *test act and corporation act*, these are the only acts which subject the protestant dissenters to any penalties or disabilities. To these, the roman catholics are subject equally with the protestant dissenters. There is, therefore, no penalty or disability that affects the protestant dissenters, to which roman catholics are not subject equally; but there still remain several penalties and disabilities, to which roman catholics are subject, that do not in any respect affect the protestant dissenters. The principal of these are, that by the 30. Car. 2. roman catholics, in consequence of refusing the oath of supremacy or the declaration against popery, are disabled from sitting in either house of parliament; by the 7th and 8th of Wm. 3. ch. 27. those who refuse to take the oath of supremacy, are disabled from voting at elections; and by several statutes, roman catholics are disabled from presenting to advowsons. This is peculiar to them, quakers and even jews having the full enjoyment of the right of presentation. It is to be observed, that, no person can be presented to a living who has not been ordained according to the rites of the church of England. Previously to his ordination, he is examined on

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his faith and morals by his bishop; he takes the oath of allegiance and supremacy, and subscribes the 39 articles; and previously to his admission, he subscribes the three articles respecting the supremacy, the Common Prayer, and the 39 articles: and he makes the declaration of conformity. By the *act of uniformity*, 13. and 14. *Car. 2. c. 4.* he is bound to use the Common Prayer and other rites and ceremonies of the church of England.—IV. 2. Upon the *corporation act*, it seems to have been the prevailing opinion, that, the election of a person, who did not comply with the requisites of that statute, and all the acts done by him, were void. To prevent the consequences of this, the statute of the 5th Geo. 1. was past, intitled, “*An act for quieting and establishing corporations*,” by which it was enacted, that, no incapacity, disability, forfeiture, or penalty should be incurred, unless the person were removed, or a prosecution against him commenced, within six months after his election. It was also enacted, that, the acts of the person, omitting to qualify, should not be avoided. Upon this act, an important question arose, whether dissenters, being ineligible to public offices, could be obliged to fine for not serving them.

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This point came to a direct issue, in the case of Allen Evans, esq. It was finally heard, in the house of lords, on the 4th February 1767, when it was determined in favour of the dissenters. For the relief of those, who omit to qualify for serving in offices, or for being elected into corporations, an act of parliament is passed annually, by which, after mentioning the corporation and test acts, and some others, which do not relate to the point under consideration, it is enacted, that, persons who, before the passing of the act, have omitted to qualify in the manner prescribed by those acts, and who shall properly qualify before the 25th of the ensuing December, shall be indemnified against all penalties, forfeitures, incapacities, and disabilities; and their elections, and the acts done by them, are declared to be good. There is nothing in this act which excludes catholics from the benefits of it.—IV. 2. *By the militia act*, it is enacted, that, no person shall be enrolled in the militia, unless he takes the following oath; “ I A. B. do sincerely promise and swear, “ that, I will be faithful and bear true allegiance to his majesty King George, his heirs and successors. And I do swear, that “ I am a protestant, and that I will faithfully

“ serve in the militia, within the kingdom of Great Britain, for the defence of the same, “ during the time for which I am enrolled, “ unless I shall be sooner discharged.” It seems to deserve consideration, whether, under the existing laws, catholics may not claim to be exempted from serving in the militia, upon the same ground, as, in the cited case of Allen Evans, the protestant dissenter claimed, and were allowed, to be exempted from the obligation of serving in offices, viz. That by law they are ineligible, and consequently are not compellable to fine for not serving.—IV.

3. *With respect to the right of roman catholics to serve on juries*, there does not appear to have ever been any law, which subjected them to any such disability, except the statutes, generally called the statutes of recusancy. The statute of the 13 Car. 2. commonly called the corporation act, relates to those offices only, which concern the government of cities and corporations. The statute of the 25th Car. II. commonly called the test act, (since explained by the 9th of Geo. II.), regards only civil and military offices. Neither of these acts, therefore, abridges catholics of the right in question. With respect to the statutes of recusancy, among other penalties,

ties to which these subjected popish recusants convict, one was, that, they became liable, upon conviction, to all the consequences of excommunication, and it has been generally understood, that, persons excommunicated are disabled from serving on juries. We have more than once observed, that, in the proper sense of the word, not attending the service of the church of England alone, and unaccompanied by any other circumstance, constitutes recusancy. Of this non-attendance at church, every roman catholic, necessarily, was guilty, and he might be convicted of it by a very summary process. But till his guilt was established in a judicial manner, the law did not take notice of it; and therefore, unless an actual conviction had taken place, he was not subject to any of the penalties consequent to recusancy. But it has been mentioned, that, there was besides this, a species of constructive recusancy, to which every catholic was liable, by refusing to make the declaration against popery, and to take the oath of supremacy. This had a more direct operation on their ability to serve as jurors. Now as well the declaration against popery as the oath of supremacy might be tendered to a catholic in the very court where he presented

sented himself to serve as a jurymen. A refusal amounted to conviction; on conviction he became subject to all the penalties of excommunication, and one of those penalties, at least, by the opinion of the old lawyers, was a disqualification to serve on juries. Thus, it was always in the power of the court, and perhaps of any two magistrates present, to convict, on the spot, a catholic of recusancy, and thereby render, problematical at least, his capacity to serve as juror. Such appears to have been the situation of catholics, in this respect, previously to the act of the 31st of his present majesty. Since the passing of that act, they stand, as to the serving upon juries, in the same predicament, as the rest of his majesty's subjects. By that statute, they are freed from the penalties incident either to positive or to constructive recusancy. It is observable, that the 8th section exempts the ministers of roman catholic congregations from serving on juries; it seems to follow, that, without this clause, they would have been liable to serve, and consequently, that, all persons out of the reach of this clause, are in the eye of the law subject to the duty, and have, of course, the capacity of serving.—IV. 4. With respect to the *right of roman*

roman catholic merchants to be summoned to the meetings of British factories abroad, it appears, that they have, and always had, a right to be admitted to them. The meetings of the factory in Portugal were regulated by the 8. Geo. 1. c. 17. but that act contains nothing, which discriminates roman catholic, from other merchants. All the foreign factories are, therefore, in this respect, in the same predicament. Now, if roman catholics are excluded from factories by any act, it must be, either by the corporation act, or by the test act. But with respect to the corporation act, it is to be observed, that, a factory is not a corporation, in the legal acceptance of that word; and even if it were, it would not fall within the operation of the corporation act, as that is confined to cities, corporations, &c. within England and Wales, and the town of Berwick upon Tweed. The operation of the test act is more extensive than the operation of the corporation act; it expressly mentions his majesty's navy, the islands of Jersey and Guernsey, and persons, who should be admitted into any service or employment in his majesty's or his royal highness's household, within the districts therein mentioned. A factory abroad does not, therefore, fall with-
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in the operation of that act. Besides, the privilege of being admitted to the meetings of a foreign factory, is not an office, or even a right, of that description, which falls within either of those acts. There is reason to suppose, that, in point of fact, roman catholics have not generally been summoned to attend meetings of factories, since the year 1720. But no person, who is acquainted with the code of penal law against roman catholics, particularly the statutes against recusancy, will be surprized at this circumstance, or draw any argument from it against the right contended for, as the operation and tendency of those statutes were such, as induced roman catholics to forbear asserting some of their most valuable rights, even such as were of the most indisputable nature, rather than obtrude themselves into public notice. If they wish to enforce their right of admision, or their right of voting, they should give notice of their desire to be summoned, and offer to attend at the meetings; then, if admittance should be refused them, or their votes rejected, the proceedings will be illegal: and not only they, but all other persons subject to the proceedings of the factory, will be justified in refusing to pay their contribution-

contribution-money, or to comply, in any other manner, with the resolutions or orders of the meeting. Besides, a refusal to admit them to the meetings, is certainly a personal injury; and wherever a personal injury is done to an English subject abroad, the remedy must be sought in the jurisdiction where the cause of action happens, if it is subject to the king's jurisdiction; if the king has no jurisdiction in that place, this necessarily gives the king's courts a jurisdiction, within which it is brought, by the known fiction of laying the venue in some county of England. This is explained by lord Mansfield, with his usual clearness and ability, in his argument in *Fabrigas v. Mostyn*, Cowp. 170. See also *Phillybrown v. Ryland*, in Stra. 624. Lord Raymond, 1388. and 8. Mod. 354. It is to be observed, that, in the great case of *Ashby v. White*, where an action was brought against an officer, for refusing a man's vote at an election; the only ground for questioning the action was, that, there, the house of commons had special jurisdiction. See 6. Mod. 45. 1. Salk. 19. 1. Bro. Parl. Ca. 45. This, it is evident, does not apply to the case now under discussion. What has been said of the right of Roman catholics to insist

on being admitted to the meetings of English factories, abroad, and of their means of redress, in case of refusal, applies, with proper qualifications, to every other case, of a similar description, where their right of admission, acting, or voting, is refused them.—IV.

5. *With respect to the right of Roman catholics to hold offices exercisable abroad*:—It has been observed, that, the corporation act extends only to cities, &c. within England and Wales, and the town of Berwick upon Tweed; that, the test act mentions only those places, and his majesty's navy, and Jersey and Guernsey; and that, the 31st of his present majesty repeals the statutes of recusancy, and relieves from the penalties imposed on Roman catholics refusing the oath of supremacy, and the declaration against popery; it seems therefore to follow, that, there is now in force, no law which disables Roman catholics from holding offices wholly exercisable abroad, or from serving or holding offices under the East India company, in their foreign possessions. Besides, upon the construction of these laws, and of every other law supposed to affect the Roman catholics, there seems reason to think, that, the same spirit, which induced the legislature

statute to repeal so large a proportion of the penal code against them, will influence the judicature in their construction of the unrepealed part of that code, or of any other statute unfavourable to them, in its apparent tendency or operation, so far as it may be open to a doubtful interpretation.



OATHS REFERRED TO

IN THE FOREGOING ANNOTATION.

THE OATH OF ALLEGIANCE,
by the I. G. 2. c. B.

I, *A. B.* do sincerely promise and swear, that I will be faithful, and bear true allegiance to his Majesty King George: So help me God.

THE OATH OF SUPREMACY,
by the same Statute.

I, *A. B.* do swear, that, I do from my heart abhor, detest, and abjure, as impious and heretical, that damnable doctrine and position, that princes excommunicated or deprived by the pope, or any authority of the see of Rome, may be deposed or murdered by their subjects, or any other whatsoever. And I do declare, that no foreign prince, person, prelate, state, or potentate, hath or ought to have any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm: So help me God.

THE

THE OATH OF ABJURATION,
by the 6. G. 3. c. 53.

I, *A. B.* do truly and sincerely acknowledge, profess, testify, and declare in my conscience, before God and the world, that our sovereign Lord King George is lawful and rightful king of this realm, and all other his majesty's dominions thereunto belonging. And I do solemnly and sincerely declare, that I do believe in my conscience, that not any of the descendants of the person who pretended to be prince of Wales during the life of the late King James the second, and since his decease pretended to be, and took upon himself the stile and title of King of England, by the name of James the third, or of Scotland, by the name of James the eighth, or the stile and title of King of Great Britain, hath any right or title whatsoever to the crown of this realm; or any other the dominions thereunto belonging: And I do renounce, refuse, and abjure any allegiance or obedience to any of them. And I do swear, that I will bear faith and true allegiance to his majesty King George, and him will defend, to the utmost of my power, against all traitorous conspiracies and attempts whatsoever,

ever, which shall be made against his person, crown, or dignity. And I will do my utmost endeavour, to disclose and make known, to his majesty and his successors, all treasons and traitorous conspiracies, which I shall know to be against him, or any of them. And I do faithfully promise, to the utmost of my power, to support, maintain, and defend the succession of the crown against the descendants of the said James, and against all other whatsoever; which succession, by an act, entitled, An act for the further limitation of the crown, and better securing the rights and liberties of the subject, is and stands limited to the princess Sophia, electress and dutchess dowager of Hanover, and the heirs of her body, being protestants. And all these things I do plainly and sincerely acknowledge and swear, according to these express words by me spoken, and according to the plain and common sense and understanding of the same words, without any equivocation, mental evasion, or secret reservation whatsoever. And I do make this recognition, acknowledgment, abjuration, renunciation, and promise, heartily, willingly, and truly, upon the true faith of a christian: So help me God.

The

THE DECLARATION AGAINST TRANSUB-
STANTIATION, by the 25. C. 2. c. 2.

I, *A. B.* do declare, that I do believe, that there is not any transubstantiation in the sacrament of the Lord's Supper, or in the elements of bread and wine, at or after the consecration thereof by any person whatsoever.

THE DECLARATION AGAINST POPERY,
by the 30. C. 2. st. 2. c. 1.

I, *A. B.* do solemnly and sincerely, in the presence of God, profess, testify, and declare, that I do believe, that in the sacrament of the Lord's supper there is not any transubstantiation of the elements of bread and wine into the body and blood of Christ, at or after the consecration thereof by any person whatsoever: And that the invocation, or adoration of the Virgin Mary, or any other saint, and the sacrifice of the mass, as they are now used in the church of Rome, are superstitious and idolatrous: And I do solemnly in the presence of God profess, testify, and declare, that I do make this declaration, and every part thereof, in the plain
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and ordinary sense of the words read unto me, as they are commonly understood by English protestants, without any evasion, equivocation, or mental reservation whatsoever, and without any dispensation already granted me for this purpose by the pope, or any other authority or person whatsoever, or without any hope of any such dispensation from any person or authority whatsoever, or without thinking that I am or can be acquitted before God or man, or absolved of this declaration, or any part thereof, although the pope, or any other person or persons, or power whatsoever, shall dispense with or annul the same, or declare that it was null and void from the beginning.

The OATH prescribed by the 18. G. 3.

I, *A. B.* do sincerely promise and swear, that I will be faithful and bear true allegiance to his majesty king George the third, and him will defend, to the utmost of my power, against all conspiracies and attempts whatever that shall be made against his person, crown, or dignity; and I will do my utmost endeavour to disclose and make known to his majesty, his heirs and successors, all treasons

treasons and traitorous conspiracies, which may be formed against him or them; and I do faithfully promise to maintain, support, and defend to the utmost of my power, the succession of the crown in his majesty's family, against any person or persons whatsoever; hereby utterly renouncing and abjuring any obedience, or allegiance unto the person taking upon himself the stile and title of Prince of Wales, in the life-time of his father, and who, since his death, is said to have assumed the stile and title of King of Great Britain, by the name of Charles the Third, and to any other person claiming or pretending a right to the crown of these realms; and I do swear, that I do reject and detest, as an unchristian and impious position, that it is lawful to murder or destroy any person or persons whatsoever, for, or under pretence of their being hereticks; and also that unchristian and impious principle, that no faith is to be kept with hereticks: I further declare, that it is no article of my faith, and that I do renounce, reject, and abjure, the opinion, that princes excommunicated by the pope and council, or by any authority of the see of Rome, or by any authority whatsoever,

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may be deposed or murdered by their subjects, or any person whatsoever: And I do declare, that I do not believe that the pope of Rome, or any other foreign prince, prelate, state or potentate, hath, or ought to have, any temporal or civil jurisdiction, power, superiority, or pre-eminence, directly or indirectly, within this realm. And I do solemnly, in the presence of God, profess, testify, and declare, that I do make this declaration, and every part thereof, in the plain and ordinary sense of the words of this oath; without any evasion, equivocation, or mental reservation whatever, and without any dispensation already granted by the pope, or any authority of the see of Rome, or any person whatever; and without thinking that I am or can be acquitted before God and man, or absolved of this declaration, or any part thereof, although the pope, or any other persons or authority whatsoever, shall dispense with or annul the same, or declare that it was null or void.

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The OATH prescribed by the 31. Geo. 3. c. 32.

I, *A. B.* do hereby declare, that I do profess the Roman catholic religion.

I, *A. B.* do sincerely promise and swear, that I will be faithful and bear true allegiance to his majesty King George the Third, and him will defend, to the utmost of my power, against all conspiracies and attempts whatever that shall be made against his person, crown, or dignity; and I will do my utmost endeavour to disclose and make known to his majesty, his heirs and successors, all treasons and traitorous conspiracies which may be formed against him or them: And I do faithfully promise to maintain, support, and defend, to the utmost of my power, the succession of the crown; which succession, by an act, intituled, *An Act for the further Limitation of the Crown, and better Securing the Rights and Liberties of the Subject*, is and stands limited to the Princess Sophia, Electress and Duchess Dowager of Hanover, and the heirs of her body, being protestants; hereby utterly renouncing and abjuring any obedience or allegiance unto any other person claiming or pretending a right to the crown of these realms:

alms: And I do swear, that I do reject and detest, as an unchristian and impious position, that it is lawful to murder or destroy any person or persons whatsoever, for or under pretence of their being hereticks or infidels; and also that unchristian and impious principle, that faith is not to be kept with hereticks or infidels: And I further declare, that it is not an article of my faith, and that I do renounce, reject, and abjure the opinion, that princes excommunicated by the pope and council, or any authority of the see of Rome, or by any authority whatsoever, may be deposed or murdered by their subjects, or any person whatsoever: And I do promise, that I will not hold, maintain, or abet any such opinion, or any other opinions contrary to what is expressed in this declaration: And I do declare, that I do not believe that the pope of Rome, or any other foreign prince, prelate, state, or potentate, hath, or ought to have, any temporal or civil jurisdiction, power, superiority, or pre-eminence, directly or indirectly, within this realm: And I do solemnly, in the presence of God, profess, testify, and declare, that I do make this declaration, and every part thereof, in the plain and ordinary sense of the words of this oath, without

without any evasion, equivocation, or mental reservation whatever; and without any dispensation already granted by the pope, or any authority of the see of Rome, or any person whatever; and without thinking that I am or can be acquitted before God or man, or absolved of this declaration, or any part thereof, although the pope, or any other person or authority whatsoever, shall dispense with or annul the same, or declare that it was null and void:



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